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HAROLD B. WILLEY, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 570

C. CLARENCE KASKEL, A Taxpayer of the City of New York,

Petitioner,

VINCENT R. IMPELLITTERI, as Mayor of the City of New York, LAZARUS JOSEPH, as Comptroller of the City of New York, RUDOLPH HALLEY, as President of the City Council of the City of New York, ROBERT F. WAGNER, JR., as President of the Borough of Manhattan, JOHN CASHMORE, as President of the Borough of Brooklyn, JAMES J. LYONS, as President of the Borough of the Bronx, JAMES A. LUNDY, as President of the Borough of Queens, THOMAS F. REILLY, JR., as Acting President of the Borough of Richmond, constituting the Board of Estimate of the City of New York, and THE CITY OF NEW YORK,

Respondents,

and

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, JOINTLY OR IN THE ALTERNATIVE

HAROLD L. HERZSTEIN,
Counsel for the Petitioner.

CECIL A. CITRON and
IRVING E. KANNER,
Of Counsel.

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The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of

New York, County of New York (R. pp. 8, 114, 115), and the judgment of affirmance thereof by the Court of Appeals of the State of New York (R. pp. 110, 111).

Opinions Below

The opinion of the Supreme Court of the State of New York, County of New York (R. pp. 60-71) is reported at 121 N. Y. Supp. 2d 848. The opinion of the Court of Appeals and the dissenting opinion (R. pp. 88-106) are reported at 306 N. Y. 73 (in 125 N. Y. Supp. 2d Advance Sheets, No. 4, December 22, 1953).

Jurisdiction

The Court of Appeals amended the remittitur so as to read as follows (R. pp. 104, 109):

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, as follows: Whether the taking by the City of New York of the properties here involved was, on this record, a deprivation of due process under the Fourteenth Amendment. The Court held that there was no such deprivation."

The question under the Constitution of the United States was raised in the complaint (R. pp. 63, 64) and in the briefs submitted in the appellate courts. The fact that such a question was presented is indicated in the quotation of the Court of Appeals above. The specific question raised under the Fourteenth Amendment is set forth in detail in the next heading.

The original judgment of the Court of Appeals was rendered on October 23, 1953 (R. pp. 110, 111). The petitioner duly and timely moved for reargument which the Court of Appeals denied by an order made on November 17, 1953 (R. p. 112).

Jurisdiction exists under 28 U. S. C. Sec. 1257 and Sec. 2101.

Question Presented

Do the following constitute a deprivation by a State of a person of property without due process of law within the meaning of the Fourteenth Amendment:

(a) The taking of private property for the purpose of conveying the same to a private corporation for private exploitation and the effectuation thereof?

(b) The denial of the opportunity to the owner of such property to prove that the taking was for a purpose other than the public purpose alleged, *i, e.,* slum clearance, and to prove that the taking was specifically and in truth for another purpose, not public?

Statutes Involved

The pertinent statutory provisions are printed in Appendix A, *infra,* pp. 15-20 .

Statement

It is history that for many years the City of New York has attempted to build a coliseum and convention hall at Columbus Circle in New York City, an area of both national and international interest. First, it tried to interest the Madison Square Garden Corporation and then the World Trade Corporation. Later the respondent, Triborough Bridge and Tunnel Authority entered the picture. Nothing could be accomplished because the acquisition costs in that area were too high for the successful financing of such a project on a self-sustaining and self-liquidating basis.

In 1949 Congress enacted the National Housing Act of 1949 (Ch. 338, Title I, 63 Stat., 42 U. S. C.). Under that Act the Federal Government undertook to grant to

municipalities two-thirds of the acquisition costs of a slum or deteriorated area, provided that if the area is not residential at the time of acquisition, that it will be developed for predominantly residential use. In the Federal funds the City saw an opportunity to finance the coliseum and convention hall project. They had to and did resort to two principal maneuvers to accomplish the goal.

First, the area had to be enlarged beyond the land needed for the coliseum and convention hall so that housing could be provided which would dominate the site as required by the Act. The area was enlarged over prior plans for the coliseum so that it finally included two square blocks. The coliseum and convention hall were to be constructed on the easterly half of the two square blocks and the private housing on the westerly half of those two square blocks. Usually, a slum is a substantial area of a city, and not just two square blocks, but this was just the right sized package to get Federal aid for the construction of the coliseum and convention hall. In fact, the City states that it gave it just 51% for housing (R. p. 153).

Secondly, the area was denominated substandard and unsanitary. Up to this time, this area had not been on the City's Master Plan as a slum, whereon all slums are mapped. It was put on the Plan on the very same day, December 12, 1952, and in the very same resolution which provided for the condemnation and redevelopment ("Exhibit A").

The project area consists of the two square blocks bounded on the east by the westerly sides of Eighth Avenue, Columbus Circle and Broadway; on the north by the southerly side of West 60th Street; on the west by the easterly sides of Columbus and Ninth Avenues; and on the south by the northerly side of West 58th Street, in the Borough of Manhattan, County, City and State of New York ("Exhibit H"). The petitioner's property is

not in the coliseum-convention hall portion of the area. It is rather in the part of the area which is the so-called housing part. It is so located that it will become the object of ownership and exploitation by an entrepreneur, Columbus Circle Apartments, Inc. (organized for the job on hand), through the construction of magnificent, terraced, balconied, profit-yielding apartments, unless this Court eventually rules otherwise.

The City entered into agreements with (i) the Federal Housing and Home Finance Agency for Federal aid ("Exhibit B", "Exhibit H" and "Exhibit I"), (ii) the Triborough Bridge and Tunnel Authority for the construction of the coliseum and convention hall ("Exhibit E" and "Exhibit F"); and Columbus Circle Apartments, Inc., for the construction of apartment houses to rent for $43.00 a room ("Exhibit G" and "Exhibit H"). The City was to condemn the area and sell half to the Triborough Bridge and Tunnel Authority and half to Columbus Circle Apartments, Inc., for their respective projects.

After making the agreements referred to above, the City commenced the condemnation proceeding pursuant to Subdivision 2 of Section 72-k of the General Municipal Law of the State of New York. This is our slum clearance and redevelopment statute and appears at pages 15-17 in the Appendix. The petitioner as an owner of real property and also as a taxpayer commenced a taxpayer's action under Section 51 of the General Municipal Law and asked for an injunction against the presecution of the condemnation proceeding.

The Court of Appeals by a vote of five to two affirmed the summary judgment dismissing the petitioner's complaint. A judgment on that affirmance was entered (R. pp. 116, 117). While the record on this case ends there, since that time the City obtained an order of condemnation which vested it with title, and sold the respective parts of the area to Triborough Bridge and Tunnel Authority and Columbus Circle Apartments, Inc.

Specification of Errors to be Urged

The Federal constitutional question in this case is accentuated by the clash in the prevailing and dissenting opinions. The word "clash" is used without reservation.* While no reference to the Fourteenth Amendment was made in the opinions, nevertheless, it is apparent from the opinions and the certificate of the Court of Appeals referred to at page 2., *supra,* that the constitutional propriety of the taking was the principal consideration and the only issue on which there were differences of opinion in the Court.

Before going into the constitutional question, the petitioner desires to inform this Court that no challenge is being made as to the constitionality of Section 72-k of the General Municipal Law. This Court in *Burt* v. *Pittsburgh,* 340 U. S. 802, affirmed a three-Judge Federal Court order which dismissed a complaint which challenged the constitutionality of the Pennsylvania slum clearance and redevelopment statute. It agreed with the court below that states determine what constitutes a public use. It held no more than that. It certainly did not hold that such a statute could be misapplied so as to take one man's property away from him and give it to another man under the guise of slum clearance where proof would show that the object was other than slum clearance.

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* The prevailing opinion states: "Of course, none of the buildings are as noisome or dilapidated as those described in Dicken's novels or Thomas Burke's 'Limehouse' stories of the London slums of other days, * * *" (R. pp. 88, 89). The dissenting opinion counters with equal sarcasm: "It does very well to cite Dicken's novels, or Thomas Burke's 'Limehouse' stories of the London slums of other days, but these have nothing to do with condemning the Manufacturers Trust Building in this 'slum' area, assessed at $1,500,000, in order to make way for a coliseum—a laudable object, to be sure, but not one whose connection with slum clearance is so clear as to be taken for granted without a trial" (R. p. 93).

The petitioner believes that there will be no dispute as to the following:

First, that Columbus Circle Apartments, Inc. is a private corporation ("Exhibit G" and "Exhibit H").

Secondly, that the apartment houses to be built by that corporation are not a public use ("Exhibit H" at pp. 3 and 18). No contention has been made that such apartment houses are a public use, and it is not believed that one will be made now. In New York State a privately owned, high rental apartment house has never been considered a public use. In *In Matter of Niagara Falls & Whirlpool R. Co.*, 108 N. Y. 375, the Court wrote at page 385, as follows:

> "What is a public use is incapable of exact definition. The expressions *public interest* and *public use* are not synonymous. The establishment of furnaces, mills and manufactures, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, the public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings." (Emphasis in opinion of Court.)

An apartment house appears to be in the same category as a hotel.

Thirdly, that if the purpose of the condemnation of the area in which the petitioner's property was situate was to provide housing so that Federal funds could be obtained for the construction of the coliseum-convention hall, such purpose is not a public purpose. Obviously, a municipality cannot take property for the purpose of making money with it; whether it be by resale or by getting a Federal grant which the municipality could not otherwise get. This principle was emphasized in the excess condemnation cases, in which this Court repeatedly prohibited any money mak-

ing practices. In *Cincinnati* v. *Vester,* 33 F. (2d) 242, aff'd 281 U. S. 439, it was held that the taking of more property than was necessary for the widening of a street, so that a city could sell such excess property at a profit, was a violation of the Fourteenth amendment. If the condemnation of the petitioner's property was for the purpose of financing the coliseum-convention hall rather than to eliminate a slum then he was denied due process by the refusal to let him prove that purpose.

Obviously, if a public purpose is pretended rather than intended, government has no right to take a man's property for transfer to another man. *Missouri Pac. R'y Co.* v. *Nebraska,* 164 U. S. 403. Since slum clearance and redevelopment statutes are relatively new in our jurisprudence, there are very few authorities directly on that point in regard to them. The dissenting opinion in this case and *Schneider* v. *District of Columbia, et al.; Morris* v. *District of Columbia Redevelopment Land Agency* (unreported but to be reported as counsel has been informed), November 5, 1953, before a statutory three-judge court in the District of Columbia, are the only cases counsel knows about.

The *Schneider* case gives an excellant guide as to the purposes for which slum clearance and redevelopment statutes can be used. In that case, a challenge had been made as to the constitutionality of the District's slum clearance and redevelopment statute. The three-judge court in a thirty-eight page opinion held the act constitutional, but carefully pointed out the limitations on it, one of the principal ones being the purpose for which the condemnation is sought. The Court wrote, in part, as follows:*

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* The petitioner's counsel has been unable to get a copy of the opinion. The excerpt is quoted as it appeared in the January, 1954 issue of the American Society of Planning Officials Newsletter. Counsel has been informed that the opinion will be published officially shortly. If there is any error in the quotation, counsel apologizes to this Court.

"With these principles in mind we hold that the seizure of title to real estate upon which slums exist or upon which a slum may be foreseen would be valid under the Constitution only to the extent that the taking is reasonably necessary to the accomplishment of the asserted public purpose. We hold that the Redevelopment Act goes no further than that, that it confers upon the administrative officials power to seize property, under the limitations we have described, only for the purpose of eliminating or preventing conditions injurious to the public health, safety, morals or welfare. Thus construed, we hold the statute to be valid. * * *"

Judge Van Voorhis who wrote the dissenting opinion, in which Judge Fuld concurred, relied on the same theory expressed in the *Schneider* case, *supra, i. e.*, that the petitioner had a right to prove that his property was being taken for other than slum clearance purposes, but rather to finance the coliseum-convention hall with Federal aid. He stated at folio 92, as follows:

"If the purpose of this project is not primarily slum clearance, if the comparatively small number of sub-standard and insanitary dwellings to be eliminated could not rationally require the redevelopment of the site area as a whole, plaintiff contends that this would be an indication that the object of the project is not slum clearance but the erection of a coliseum on Columbus Circle, which is not a slum area, and which the evidentiary facts in the papers before the court indicate does not need to be redeveloped in order to eliminate the substandard buildings on or near Ninth Avenue. The necessity for linking the Columbus Circle section to the other area is not so clear, in my view, in the face of the proofs to the contrary, as to justify dismissing the complaint on motion for summary judgment.

There is no rational basis, according to plaintiff, for linking the Columbus Circle portion of the site area to the Ninth Avenue section in order to eliminate tenements on or in the immediate vicinity of Ninth Avenue. The contention is that redevelopment of the Ninth Avenue section, where some substandard and insanitary tenements are located, is unrelated to the more valuable property to be acquired in the vicinity of Columbus Circle, where there are no tenements, that these are really two separate areas, and that the small amount of slum dwellings on and near Ninth Avenue could easily be eliminated separately, and would not have been undertaken jointly except for the coliseum. If that be true plaintiff is entitled to enjoin the expenditure by the city of its share in the cost as a waste of public funds, regardless of however desirable a coliseum might be or however advantageous it might be to the city to have two thirds of its land cost paid from the Treasury of the United States. If the main purpose of combining these two areas is not slum clearance, but merely to lend color to the acquisition of land for a coliseum under the guise of a slum clearance project, then the combined project is not authorized by statute, and a taxpayer's action can be maintained to restrain it under section 51 of the General Municipal Law (*Denihan Enterprises* v. *O'Dwyer*, 302 N. Y. 451). In that event, the courts would not be invading the administrative province, but performing their duty in limiting administrative officials, capable and public spirited as they may be, to spending public money for purposes authorized by law."

Counsel realizes that the items of proof which he knows that the petitioner would have submitted are not important to this Court, as they would be in a state court on a question of fact. However, he desires to indicate some of them so that the Court will realize that there is reality to the

argument that a denial of the right to present such proof was a denial of due process. Some of the proof which the petitioner would have submitted, had the right not been denied him, appears in the dissenting opinion and in the briefs and is as follows:

1. The historical desires and inabilities to finance the coliseum-convention hall until Federal aid came along, and the fact that the coliseum-convention hall area was extended just enough to get such aid.

2. The fact that in the State Division of Housing in its West Side survey did not include this area in the slum area.

3. The fact that only two square blocks are involved and that no slum clearance was intended on such a basis.

4. The fact that the estimated cost of the land alone would be $9,500,000, or $15,780 per person living in existing tenements.

5. The fact that the easterly portion of the site contains the famous Columbus Circle frontage with its many theaters, restaurants, and office buildings, including the Manufacturers Trust Building assessed at $1,500,000.—certainly not part of a two block slum clearance project.

6. The fact that 2% of the area and 1% in value is deteriorated.

7. In addition, the petitioner believes that if he were entitled to prove purpose, he could prove that the City's officials connected with this project had in mind financial aid for the construction of a coliseum-convention hall rather than a slum clearance project.

The prevailing opinion did not go into the question of purpose. It held that since the City officials denominated

the area a slum, there was no further question. It stated at folio 90, as follows:

"The question is simply not a justiciable one."

The petitioner submits that the holding by the majority that the question of whether the area is a slum is not justiciable does not answer the question of the proper exercise of due process. As stated in the *Schneider* case, *supra,* and by Judge Van Voorhis there is still a question as to the purpose of the condemnation. If it is not slum clearance, then a man's property cannot be taken away from him because it is in a blighted area. There is no more right to deprive a man of his property for the purpose of getting Federal aid for a coliseum because his property lies in a slum area than there would be if his property were situate in the finest residential area of the City.

The City may urge, as it did on one occasion, that the petitioner has had a trial of the issues which he raises and that such trial was by affidavits rather than testimony in accordance with State law. This is not a true appraisal of the significance of summary judgment. An order granting a motion for summary judgment in New York State means that the Court has found that there is no triable issue of fact. Rule 113, Rules of Civil Practice, and opinion by Judge Cardozo in *Curry* v. *Mackenzie,* 239 N. Y. 267, at page 270. The making of such an order does not mean that the Court has disposed of a triable isue raised in affidavits, but rather than in its opinion there is no issue to try. The dismissal of the complaint on a motion for summary judgment in this case meant, in effect, that in the Court's opinion, as a matter of law, the purpose of the condemnation was not an issue to be tried. In view of the fact that the dissenting judges laid such stress on the fact that it was an issue to be tried, the failure of the majority of the Court to mention it, cannot mean anything else than that in the opinion of the majority purpose was not an issue.

The majority of the Court did not say that the petition did not raise sufficient facts on the question of purpose so that he was not entitled to a trial. The position it took is that the question raised by the petitioner was not justiciable.

The petitioner is not raising a question of practice. If he is entitled to prove that his land, whether it be in a slum or not, is being taken from him to be given to a private person so that the City may get Federal funds for the construction of the coliseum-convention hall, then the state courts must give him a chance to submit his proof. The petitioner should not be denied his right to prevent deprivation of his property by having it buried in a practice argument. Petitioner's counsel, despite this petition, has very high regard for the courts of his State, and is confident that if this Court ever indicates that the petitioner is entitled to prove the true purpose of the condemnation, that the New York courts will see that he is given that right at a trial.

Reasons for Granting Writ

1. The Federal Government, assuming that Congress accepts the recommendation made by the President in his Housing Message of January 25, 1954, is about to embark on an augmented assistance program to cities. Under "Neighborhood Rehabilitation; Slum Elimination, Prevention" the President indicated in "(1)" that there was a total of a billion dollars in loan funds and capital grants available, and that he would ask for more funds which could be effectively used. These sums, together with those which must be matched locally, will be enormous. Projects will be undertaken everywhere. There will be many attempts to condemn property in blighted areas other than for slum clearance purposes. Whether the Fourteenth Amendment will protect owners against such attempts will

become of great national importance. It should be settled now, before employment of the huge Federal appropriations gets under way.

2. If the *Schneider* case, *supra*, in the District of Columbia is good law, it should be made applicable to this case promptly. There is no other way in which the petitioner can get the benefit of that decision as to the meaning of the Fourteenth amendment as interpreted by that Federal Court.

3. There is an apparent conflict between the majority opinion in the Court of Appeals and the *Schneider* case, *supra*. The *Schneider* case make inquiry as to purpose of paramount importance. The Court of Appeals in this case, despite the minority which like the District of Columbia Court makes proof of purpose vital, held that there was no justiciable issue at all. These different constructions of the Fourteenth amendment should be resolved by this Court so people who own property in blighted areas throughout the Union will know what their rights are.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD L. HERZSTEIN,
Counsel for Petitioner.

Dated, New York, New York, January 21, 1954.

CECIL A. CITRON and
IRVING E. KANNER,
Of Counsel.

APPENDIX—STATUTE

Section 72-k of the General Municipal Law of the State of New York:

§ 72-k. Acquisition of real property for clearance and rehabilitation; sale or lease of property for such purposes

1. The governing board or other appropriate authority of a municipal corporation may acquire by purchase, gift, devise, lease, condemnation or otherwise, in accordance with the provisions of any appropriate general, special, or local law applicable to the acquisition of real property by such municipal corporation, real property or any interest therein necessary for or incidental to the clearance, replanning, reconstruction, and neighborhood rehabilitation of substandard and insanitary areas, together with adequate provision for recreational and other facilities appurtenant thereto.

2. In addition to employing any other lawful method of utilizing or disposing of any real property or any interest therein owned by a municipal corporation, or acquired by it pursuant to subdivision one of this section, such municipal corporation, acting through its board of estimate or other governing body, may sell, lease for a term not exceeding ninety-nine years, or otherwise dispose of any such real property to any person, firm or corporation at the highest marketable price or rental at public auction or by sealed bids pursuant to the provisions of any general, special or local law applicable to the sale or disposition of real property by such municipal corporation, for the purpose of clearance, replanning, reconstruction and neighborhood rehabilitation by the purchaser of such real property in substandard and insanitary areas, in such man-

ner as may be prescribed by the board of estimate or other governing body. Any deed, lease or instrument by which real property or any interest therein is conveyed or disposed of in such manner shall contain provisions requiring the purchaser or grantee to clear, replan, reconstruct or rehabilitate such property in such manner as may be prescribed by the board of estimate or other governing body, and provisions insuring the use of such real property for purposes consistent with the clearance, replanning, reconstruction and neighborhood rehabilitation of substandard and insanitary areas. Such deed or instrument may contain such other provisions, conditions and restrictions, including specifications relating to clearance, replanning, reconstruction, and rehabilitation as may be prescribed by the board of estimate or other governing body. The prior consent of the city planning commission or other analogous body of such municipal corporation shall be required for the acquisition of property by such municipal corporation for the purposes of this subdivision, which prior consent shall be based upon a finding made by such city planning commission or other analogous body after a public hearing thereon, that such acquisition is necessary for the clearance, replanning, reconstruction and neighborhood rehabilitation of real property in a substandard and insanitary area.

3. In proceeding under this section in addition to all other powers which it may exercise, a municipal corporation, acting through its board of estimate or other governing body, may: (1) cooperate with the federal government and apply for and accept financial assistance, loans and grants, as provided in title I of the housing act of nineteen forty-nine and all federal

laws amendatory and supplemental thereto; (2) provide local grants-in-aid in the form of municipal services and facilities as provided under such federal laws; (3) contract with the federal government as provided under such federal laws including agreements to comply with (a) provisions requiring payment of not less than certain minimum salaries and wages to architects, engineers, technicians, laborers, mechanics and other personnel; (b) provisions prohibiting rebates and kick-backs; (c) provisions requiring contractors and subcontractors to furnish reports and other data to the secretary of labor; and (d) such other provisions, covenants, and conditions as the federal agency may deem necessary or desirable for effectuating the federal purposes; (4) issue bonds or other obligations for the acquisition of the property in the same manner as for the acquisition of property for other public purposes. The period of probable usefulness of such purpose is hereby determined to be fifteen years; (5) provide in the discretion of the board of estimate or other local governing body, for clearance of the property by the municipality or by the person, firm or corporation to whom such property is sold or leased. In the event that clearance is provided by the municipality, the cost of such clearance shall be financed in the same manner as acquisition costs.

Portions of Title I of the National Housing Act of 1949 (42 U. S. C. Sections 1455 and 1460):

"§ 1455. Requirements for financial-aid contracts

Contracts for financial aid shall be made only with a duly authorized local public agency and shall require that—

Approval of redevelopment plan

(a) The redevelopment plan for the project area be approved by the governing body of the locality in which the project is situated, and that such approval include findings by the governing body that (i) the financial aid to be provided in the contract is necessary to enable the land in the project area to be redeveloped in accordance with the redevelopment plan; (ii) the redevelopment plans for the redevelopument areas in the locality will afford maximum opportunity, consistent with the sound needs of the locality as a whole, for the redevelopment of such areas by private enterprise; and (iii) the redevelopment plan conforms to a general plan for the development of the locality as a whole;

Obligations of purchasers or lessees of land

(b) When land acquired or held by the local public agency in connection with the project is sold or leased, the purchasers or lessees shall be obligated (i) to devote such land to the uses specified in the redevelopment plan for the project area; (ii) to begin the building of their improvements on such land within a reasonable time; and (iii) to comply with such other conditions as the Administrator finds, prior to the execution of the contract for loan or capital grant pursuant to this subchapter, are necessary to carry out the purposes of this subchapter;

* * *

§ 1460. Definitions

The following terms shall have the meanings, respectively, ascribed to them below, and, unless the context clearly indicates otherwise, shall include the plural as well as the singular number;

(a) 'Redevelopment area' means an area which is appropriate for development or redevelopment and within which a project area is located.

(b) 'Redevelopment plan' means a plan, as it exists from time to time, for the development or redevelopment of a redevelopment or project area, which plan shall be sufficiently complete (1) to indicate its relationship to definite local objectives as to appropriate land uses and improved traffic, public transportation, public utilities, recreational and community facilities, and other public improvements; and (2) to indicate proposed land uses and building requirements in the project area; *Provided,* That the Administrator shall take such steps as he deems necessary to assure consistency between the redevelopment plan and any highways or other public improvements in the locality receiving financial assistance from the General Services Administration.

(c) 'Project may include (1) acquisition of (i) a slum area or a deteriorated or deteriorating area which is predominantly residential in character, or (ii) any other deteriorated or deteriorating area which is to be developed or redeveloped for predominantly residential uses, or (iii) land which is predominantly open and which because of obsolete platting, diversity of ownership, deterioration of structures or of site improvements, or otherwise substantially impairs or arrests the sound growth of the community and which is to be developed for predominantly residential uses, or (iv) open land necessary for sound community growth which is to be developed for predominantly residential uses (in which event the project thereon, as provided in the proviso of section 1453 (a) of this title, shall not be eligible for any capital grant); (2)

demolition and removal of buildings and improvements; (3) installation, construction, or reconstruction of streets, utilities, and other site improvements essential to the preparation of sites for uses in accordance with the redevelopment plan; and (4) making the land available for development or redevelopment by private enterprise or public agencies (includin sale, initial leasing, or retention by the local public agency itself) at its fair value for uses in accordance with the redevelopment plan. For the purposes of this subchapter, the term 'project' shall not include the construction of any of the buildings contemplated by the redevelopment plan, and the term 'redevelopment' and derivatives thereof shall mean develop as well as redevelop.''

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TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Intervenor-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(34202)

Supreme Court of the United States

October Term, 1953

No. 570

C. CLARENCE KASKEL, a Taxpayer of the City of New York,

Petitioner,

against

VINCENT R. IMPELLITTERI, as Mayor of the City of New York, LAZARUS JOSEPH, as Comptroller of the City of New York, RUDOLPH HALLEY, as President of the City Council of the City of New York, ROBERT F. WAGNER, JR., as President of the Borough of Manhattan, JOHN CASHMORE, as President of the Borough of Brooklyn, JAMES J. LYONS, as President of the Borough of the Bronx, JAMES A. LUNDY, as President of the Borough of Queens, THOMAS F. REILLY, JR., as Acting President of the Borough of Richmond, constituting the Board of Estimate of the City of New York, and THE CITY OF NEW YORK,

Respondents,

and

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Intervenor-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Impellitteri and others, constituting the Board of Estimate of the City of New York, and the City of New York, for their statement in opposition to petitioner's application for a writ of certiorari, respectfully show the following:

1. Statment of Issue

The issue herein is whether the taking of petitioner's property, found by duly constituted public authorities to be located in an insanitary and substandard area, for clearance and rehabilitation, was a taking for a public purpose and therefore constitutionally permissible.

2. Facts

This action was brought to enjoin the acquisition by the City of New York of two square blocks in the Borough of Manhattan, for the purpose of slum clearance and rehabilitation. The taking was authorized by the Board of Estimate, following findings made by it, and by the Committee on Slum Clearance Plans (a duly constituted official body of the City), the City Planning Commission, and the Federal Housing Administrator.

The taking of this property was part of an extensive program of slum clearance and rehabilitation of blighted areas undertaken pursuant to the provisions of the General Municipal Law, §72-k, with financial assistance from the Federal Government pursuant to Title I of the National Housing Act of 1949 (42 U. S. C. A., §§1451-1460).

Thus far, condemnation proceedings to acquire four other projects in the City of New York have been approved by the Courts. In every case, title to the respective areas has vested in the City and the property acquired has been conveyed for clearance and redevelopment. The slum clearance projects referred to are *Harlem*, *North Harlem*, and *Corlears Hook*, 114 N. Y. S. 2d 787 [Sup. Ct., N. Y. Co.,

Eder, J.], not officially reported, and *West Park*, 128 N. Y. L. J. 349 [Sup. Ct., N. Y. Co., Eder, J., Sept. 2, 1952].

The complaint boils down to a charge that the instant Slum Clearance Project is illegal on the grounds that (1) the governing statute (Gen. Mun. Law, §72-k) is unconstitutional, and (2) the findings by duly designated official bodies that the project area is substandard and insanitary, are "unreasonable, arbitrary, capricious and illegal * * *" (complaint Paragraph "Twenty-fourth", subdivisions A and D, R. 21-23).

This action was commenced on February 24, 1953 by the service of the summons and complaint on the respondents. On February 25, 1953, respondents moved for an order dismissing the complaint for insufficiency, pursuant to Rule 106, subd. 4 of the Rules of Civil Practice. Respondents' answer was served on February 27, 1953, on which day respondents also moved for an order granting judgment on the pleadings dismissing the complaint pursuant to Rule 112 and for summary judgment pursuant to Rule 113 of the Rules of Civil Practice (R. 43-56).

The Supreme Court of the State of New York, County of New York, granted the respondents' motions to dismiss the complaint (*Kaskel* v. *Impellitteri*, 121 N. Y. S. 2d 848 [1953]), not officially reported, and its order and judgment were unanimously affirmed by the Appellate Division, First Department, 281 App. Div. 962 (1953).

The Court of Appeals affirmed the judgment of the Appellate Division (*Kaskel* v. *Impellitteri*, 306 N. Y. 73 [1953]). Petitioner herein then moved in the Court of Appeals for reargument, for a stay of the order of con-

demnation and for an amendment of the remittitur to show that a federal constitutional question had been involved in the appeal. The Court denied the motion for reargument and for a stay but granted the motion to amend the remittitur so as to add thereto the following: "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, as follows: Whether the taking by the City of New York, of the properties here involved, was, on this record, a deprivation of due process under the Fourteenth Amendment. The Court of Appeals held that there was no such deprivation." (306 N. Y. 609.)

Petitioner then applied to this Court for a stay pending the determination of his contemplated application for a writ of certiorari (the instant application). The motion for a stay was denied by this Court on November 28, 1953. The order of condemnation was entered on November 17, 1953 on which date title to the property became vested in the City of New York. On the same day the City conveyed the property to the private redevelopers for clearance and rehabilitation.

Although the affirmance by the Court of Appeals was by a divided Court (two Judges dissenting), all the Judges concurred in holding that the taking of property for slum clearance was a taking for a public use and that the challenged statute (Gen. Mun. Law, §72-k) was a constitutional enactment (R. 92, 102-105). The dissenting opinion, speaking for the entire Court, listed thirty-seven States which had enacted similar statutes and twenty-eight decisions upholding the constitutionality of such enactments (R. 104-105).

The sole ground upon which the two Judges dissented was that in their opinion petitioner was entitled to a trial of the issue as to whether the project area was, in fact, substandard and insanitary (R. 89). The majority ruling was that no such issue was present, that the statute provided for the taking of a slum area upon a finding by duly constituted public bodies that the area was substandard, that such a finding had been made and was supported by substantial evidence in the record, and that petitioner's disagreement with such finding did not raise a justiciable issue (R. 89-90).

POINT I

The acquisition of substandard and insanitary property for clearance and rehabilitation is a taking for a public use and, therefore, does not contravene the due process clause of the Fourteenth Amendment. No other Federal question is presented by the petition.

(1)

The due process clause of the Fourteenth Amendment has been held to mean that private property may be taken under the States' power of eminent domain if the taking is for a public purpose. *Rindge Co.* v. *Los Angeles,* 262 U. S. 700 (1923); *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 158 (1896); *Clark* v. *Nash,* 198 U. S. 361 (1905).

The clearance of slum areas has come to be universally regarded as a public purpose. For, as the Court observed in *Wells* v. *Housing Authority of City of Wilmington,* 213 N. C. 744, 197 S. E. 693, 696 (1938):

> "The State cannot enact laws, and cities and towns cannot pass effective ordinances, forbidding

> disease, vice, and crime to enter into the slums of overcrowded areas, there defeating every purpose for which civilized government exists, and spreading influences detrimental to law and order; but experience has shown that this result can be more effectively brought about by the removal of physical surroundings conducive to the conditions."

Slum clearance statutes have been enacted and their constitutionality upheld in more than two-thirds of the States of the Union. In addition to the authorities cited by the Court of Appeals (R. 105),* we cite the following more recent decisions: *People ex rel. Gutknecht* v. *City of Chicago,* 414 Ill. 600, 111 N. E. 2d 626 (1953); *Oliver* v. *City of Clairton,* 374 Pa. 338, 98A. 2d 47 (1953); *Chicago Housing Authority* v. *Berkson,* 415 Ill. 159, 112 N. E. 2d 620 (1953); *Foeller* v. *Housing Authority of Portland,* Ore. , 256 P. 2d 752 (1953); *Herzinger* v. *Mayor of Baltimore,* Md. , 98A. 2d 87 (1953); *State ex rel. Bruestle* v. *Rich,* 150 Ohio St. 13, 110 N. E. 2d 778 (1953); *Chicago Land Clearance Commission* v. *White,* 411 Ill. 310, 104 N. E. 2d 236 (1952), cert. den. 344 U. S. 824 (1952); *Rowe* v. *Housing Authority of City of Little Rock,* 220 Ark. 698, 249 S. W. 2d 551 (1952); *Opinion to the Governor,* 76 R. I. 249, 69A. 2d 531 (1949); *Ferch* v. *Housing Authority of Cass County,* N. D. , 59 N. W. 2d 849 (1953); *Opinion of the Justices,* 254 Ala. 343, 48 So. 2d 757 (1950).

In the case last cited above and in *Herzinger* v. *Mayor of Baltimore, supra,* 98A. 2d 87, the Courts upheld the constitutionality of slum clearance statutes which enabled

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* In the dissenting opinion, voicing, however, the views of the entire Court (see *ante,* p. 4).

cities to avail themselves of Federal assistance under Title I of the National Housing Act of 1949. After citing a number of recent authorities from various jurisdictions, the Courts held that clearing a slum area is a public purpose.

It is now well settled that slum clearance is in itself a public purpose and that the rehabilitation of the cleared area may be accomplished by a private redeveloper. The Courts have held that the acquisition of slum property for clearance and resale to private redevelopers does not violate the principle that private property may not be acquired by eminent domain for a private use. *Matter of Murray* v. *La Guardia,* 291 N. Y. 320, 331-332 (1943), cert. den. 321 U. S. 771 (1944); *Belovsky* v. *Redevelopment Authority,* 357 Pa. 329, 54 A. 2d 277, 282, 172 A. L. R. 953 (1947); *In re Slum Clearance in City of Detroit,* 331 Mich. 714, 50 N. W. 2d 340, 343 (1951); *Nashville Housing Authority* v. *City of Nashville,* 192 Tenn. 103, 237 S. W. 2d 946, 948 (1951); *Chicago Land Clearance Commission* v. *White, supra,* 411 Ill. 310, 104 N. E. 2d 236, 239, cert. den. 344 U. S. 824; *Schenck* v. *City of Pittsburgh,* 364 Pa. 31, 70A. 2d 612 (1950); *Foeller* v. *Housing Authority of Portland, supra,* 256 P. 2d 752, 769; *People ex rel. Gutknecht* v. *City of Chicago, supra,* 414 Ill. 600, 111 N. E. 2d 626; *Opinion to the Governor, supra,* 76 R. I. 249, 69A. 2d 531, 537; *Zurn* v. *City of Chicago,* 389 Ill. 114, 59 N. E. 2d 18, 25 (1945); *Herzinger* v. *Mayor of City of Baltimore, supra,* 98 A. 2d 87, 92; *Oliver* v. *City of Clairton, supra,* 374 Pa. 333, 98A. 2d 47.

This Court has on three recent occasions declined to review determinations which held that the taking of private

property for slum clearance and redevelopment by private capital is not a denial of due process. We have already referred to *Chicago Land Clearance Commission* v. *White*, 411 Ill. 310, 104 N. E. 2d 236, cert. den. 344 U. S. 824.

In *Burt* v. *Pittsburgh*, 340 U. S. 802 (1950), this Court, on appeal from a judgment of a three-judge Federal Court, granted a motion to affirm the judgment on the ground that no substantial question was involved. As appears from the record on appeal, plaintiff there sued to enjoin the condemnation of land in the well known Golden Triangle of Pittsburgh. The land was sought to be condemned by the City of Pittsburgh for slum clearance and private redevelopment after a finding had been made by the City Planning Commission of Pittsburgh that it was a blighted area. Plaintiff claimed that the area was not blighted and set forth allegations and exhibits in support of her position. Defendants there urged that plaintiff was not entitled to a trial and moved to dismiss the complaint. Defendants pointed out, among other things, that what plaintiff wanted was the opportunity to call witnesses who would dispute the expert opinion of the Pittsburgh Planning Commission. Defendants, therefore, urged that a trial would serve no useful purpose because the Courts would not substitute their judgment for that of the Commission.

The three-judge Federal Court granted the motion to dismiss the complaint and this Court, on appeal, held (340 U. S. 802):

> "The motion to affirm is granted and the judgment is affirmed."

In *Robinette* v. *Chicago Land Clearance Commission,* 115 F. Supp. 669 (D. C. Ill., 1951), the plaintiff asked the District Court to convene a three-judge statutory Court, claiming that an Illinois statute, the Blighted Areas Redevelopment Act, was unconstitutional. The New York Life Insurance Company, which had agreed to purchase the land from the Chicago Land Clearance Commission for private redevelopment, was one of the defendants in that action.

Plaintiff contended that the proposed taking of its property violated the Fifth, Seventh and Fourteenth Amendments to the Constitution of the United States. The District Court (CAMPBELL, D. J.) overruled each of the plaintiff's contentions and held that no substantial Federal question was presented. The Court dismissed the complaint and refused to order the convening of a statutory Court. Plaintiff then moved in this Court for leave to file a petition for a writ of mandamus, which was denied. *Robinette* v. *Campbell,* 342 U. S. 940 (1952).

(2)

The project area, when cleared, is to be improved with a coliseum and convention hall on the easterly part and a modern apartment building on the west. Judge VAN VOORHIS, in his dissenting opinion, referred to the most expensive structure now on the site, an office building not owned by the petitioner, and professed to see no connection between the taking of that property and the erection of the proposed coliseum (R. 93).

It is, however, well-settled that not every parcel in a particular area need be slum property in order to justify

the acquisition of the entire area as a slum clearance project. This was the holding in *Blakemore* v. *Cincinnati Metr. Housing Authority,* 74 Ohio App. 5, 57 N. E. 2d 397 (1943), where the Court said (57 N. E. 2d, at p. 405):

> "The question is not whether the particular property of the plaintiff was substandard or was such, if standing alone, would have been subject to slum clearance. This property may have well been above standard, but it is obvious that one or more isolated above standard properties may not stand in the way of the entire project of clearance of a large area subject to slum clearance."

In *Opinion to the Governor, supra,* 76 R. I. 249, 69 A. 2d 531, 533, the Court upheld a slum clearance and rehabilitation statute known as the Community Redevelopment Act, which provided that "a blighted area may include therein building, improvements, or lands which of themselves are not detrimental to the public interests but whose inclusion is found necessary, with or without change in their condition or use, for the effective redevelopment of the area of which they are a part."

The same principle was announced in *In re Housing Authority of Charlotte,* 233 N. C. 649, 65 S. E. 2d 761 (1951), where the Court said (65 S. E. 2d 769):

> "The housing authority is given wide discretion in the selection and location of a site for such project. * * * And the fact that a few isolated properties in an area may be taken and dismantled which are above the standard of slum properties, or that some few desirable homes will be taken will not affect the public character of the condemnation proceeding."

The case of *Stockus* v. *Boston Housing Authority,* 304 Mass. 507, 24 N. E. 2d 333, 337 (1939), is to the same effect.

There is, moreover, a definite connection between slum clearance and the erection of a modern coliseum or a modern apartment building. Eliminating a slum area is only the first step in accomplishing the public purpose. It is also necessary to insure that the conditions which caused the area to become a slum will not recur. We submit that the construction of modern buildings under "provisions, conditions and restrictions, including specifications relating to clearance, replanning, reconstruction, and rehabilitation as may be prescribed by the board of estimate" (Gen. Mun. Law, §72-k, subd. 2) provides just such insurance.

The Courts have recognized the fact that rehabilitation is part of slum elimination. In *Foeller* v. *Housing Authority of Portland, supra,* 256 P. 2d 752, the Court said (p. 767):

> "The ultimate result which the challenged statute seeks to achieve is to eliminate conditions which cause fires and breed vice, poverty or disease and to substitute for them a use of the property which will render impossible future blight."

In *Opinion to the Governor, supra,* 76 R. I. 249, 69 A. 2d 531, the Court said (69 A. 2d, at p. 537):

> "Upon the elimination of a blighted area, thus enhancing the public good, the primary purpose of the act has been accomplished. With the attainment of these fundamentally public purposes the property acquired and held by an agency has been thus clearly devoted to a public use. We see no valid objection

> to the constitutionality of the act on the ground that the agency may thereafter convey to private interests the property so reclaimed with conditions and restrictions intended to protect the public health and safety from the recurrence of blight in the future. In other words, it is of no consequence if in redeveloping the area private interests may derive some benefit as an incident to the accomplished public purpose."

(3)

The Court of Appeals in the instant case held that the statute, General Municipal Law, §72-k, properly invested duly authorized agencies of the city government with the power to determine which areas are substandard. The Court held that in the absence of fraud or corruption (and there is no such charge in the complaint) a property owner's disagreement with the agencies' finding as to the character of the area raises no triable issue. The Court said (R. 90):

> "However, the situation here actually displayed is one of those as to which the Legislature has authorized the city officials, including elected officials, to make a determination, and so the making thereof is simply an act of government, that is, an exercise of governmental power, legislative in fundamental character, which, whether wise or unwise, cannot be overhauled by the courts. If there were to be a trial here and the courts below should decide in favor of plaintiff, there would be effected a transfer of power from the appropriate public officials to the courts. The question is simply not a justiciable one."

This ruling of the Court of Appeals is in accord with the determinations made by the Courts of many States.

See, for example, *Schenck* v. *City of Pittsburgh, supra,* 364 Pa. 31, 70 A. 2d 612, 614; *Stockus* v. *Boston Housing Authority, supra,* 304 Mass. 507, 24 N. E. 2d 333, 336-337; *In re Housing Authority of Charlotte, supra.* 233 N. C. 649, 65 S. E. 2d 761, 769. *Burt* v. *Pittsburgh,* 340 U. S. 802, *ante,* p. 8, is to the same effect.

The finding made by four governmental bodies that this is a substandard and insanitary area is amply supported by the exhibits in the record (R. 51-56, 108-109). The applicable principle is, therefore, that stated by this Court in *Board* v. *Hearst Publications,* 322 U. S. 111, 131 (1944): "• • • where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing Court's function is limited." The administrative determination "is to be accepted if it has 'warrant in the record' and a reasonable basis in law" (ibid.).

In *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125 (1939) this Court said (p. 146):

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

It is hardly necessary to add that the granting of summary judgment, based on a ruling that there is no triable issue in the case, does not offend any provision of the Constitution. *Ex parte Peterson,* 253 U. S. 300, 309, 310 (1920); *Fidelity & Deposit Co.* v. *United States,* 187 U. S. 315, 319, 321 (1902); *Iowa Central Railway Company* v. *Iowa,* 160 U. S. 389 (1896); *Gen. Investment Co.* v. *Interborough R. T. Co.,* 235 N. Y. 133, 143 (1923).

(4)

That the necessity or expediency of acquiring property for a public use is a legislative and not a judicial question is too firmly established to require extensive citation of authority. The principle has been succinctly stated by this Court in *Rindge Co.* v. *Los Angeles, supra*, 262 U. S. 700, in the following language (p. 709):

> "The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers. 'Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.' *Bragg* v. *Weaver*, 251 U. S. 57, 58. 'That the necessity and expediency of taking property for public use is a legislative and not a judicial question, is not open to discussion. * * * Neither is it any longer open to question in this Court that the legislature may confer upon a municipality the authority to determine such necessity for itself * * * The question is purely political, does not require a hearing, and is not the subject of judicial inquiry.' *Joslin Mfg. Co.* v. *Providence, ante*, [262 U. S.] 668."

In the instant case the Legislature has authorized the Board of Estimate to determine what real property is necessary to be acquired for slum clearance (Gen. Mun. Law, §72-k, subd. 1). It has not, as petitioner apparently thinks, left the question of necessity or expediency to be

determined by the Courts on conflicting evidence presented by the City and by objecting property owners.

In *People* v. *Adirondack Railway Co.*, 160 N. Y. 225 (1899), aff'd 176 U. S. 335 (1900), the Court said (160 N. Y., at pp. 238-239):

> "Now, what does the phrase 'due process of law' mean when thus applied to the exercise of a sovereign power, and to the effort of government through that power to accomplish a great public purpose? * * * Due process of law necessarily varies with the facts of the case and depends upon the necessity for safeguards against the exercise of arbitrary power. It consists in the observance of those safeguards which time and experience have shown are necessary to protect the citizen in the enjoyment of life, liberty and property. In public prosecutions, as well as private controversies, an opportunity to be heard is essential to protect private rights; but here we have a case where the state has the right to take a man's property against his will, although he has been guilty of no wrong. It is a case where of necessity, if there is any action at all, it must be arbitrary. The state needs the property and takes it, and while the citizen cannot resist, he has the right to insist upon just compensation to be ascertained by an impartial tribunal. It is a compulsory purchase by public authority, and the individual receives money in the place of the property taken. He has a right to his day in court on the question of compensation, but he has no right to a day in court on the question of appropriation by the state unless some statute requires it."

This Court, in affirming, said (176 U. S., at p. 349):

> "The general rule is that the necessity or expediency of appropriating particular property for public use

> is not a matter of judicial cognizance but one for the determination of the legislative branch of the government, and this must obviously be so where the State takes for its own purposes. The State possesses the power as a sovereign and as a sovereign exerts it. How can its citizens call on the courts to review the grounds on which the State has acted in the absence of legislation permitting that to be done?"

Although the complaint makes no such charge, the petition now asserts that building a coliseum, and not slum clearance, is the real motive for the acquisition of petitioner's property. There are two answers to this claim: (1) Petitioner's property is situated at the extreme westerly side of the two-block area and the coliseum will occupy no part of his land*; (2) an allegation (if the complaint had contained such allegation) that the acquisition of petitioner's property was for a purpose other than that stated by the condemnor does not raise a justiciable issue. *Matter of Public Service Comm.*, 217 N. Y. 61 (1916), app. dism. *sub nom. O'Brien* v. *Public Service Commission*, 251 U. S. 537 (1919); *Matter of City of New York (Ely Avenue)*, 217 N. Y. 45, 58-59 (1916); *McCabe* v. *City of New York*, 213 N. Y. 468 (1915); *W. W. M. Co.* v. *Shanahan*, 128 N. Y. 345, 358-360 (1891).

(5)

Judge VAN VOORHIS, in his dissenting opinion, expressed doubt as to whether the easterly portion of the site was a slum area but had no such doubt with respect to the westerly portion bounded by Ninth Avenue, where petitioner's

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* Paragraph "Second" of complaint (R. 13); Site Plan, following p. 13 of the Brochure, part of Exh. H.

property was located (R. 92). Since the latter could unquestionably have been acquired by itself for slum clearance, petitioner can have no claim that the acquisition of the easterly part constitutes a taking of his property, *i.e.*, his real property, without due process. At best then, petitioner is relegated to the status of a taxpayer who claims that the acquisition of the easterly portion is a waste of public funds. And it is in his capacity as a taxpayer that he brought this action (R. 13). As such, he has not alleged any facts showing that the acts complained of will cause any "out of pocket" loss or damage to him. He has therefore no standing in this Court to complain that he has been or will be deprived of property without due process of law. *Doremus* v. *Board of Education*, 342 U. S. 429 (1952); *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923).

In the latter case this Court said (262 U. S., at p. 488):

> "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

The *Mellon* case was a taxpayer's action brought to restrain the alleged illegal expenditure of Federal monies. In the *Doremus* case, *supra*, this Court held that the principle above quoted was applicable to a taxpayer who seeks to restrain the expenditure of State funds (342 U. S., at p. 434). In dismissing an appeal by a taxpayer from an adverse judgment of a New Jersey court, this Court said (342 U. S., at p. 433):

> "The complaint is similarly niggardly of facts to support a taxpayer's grievance. Doremus is alleged to be a citizen and taxpayer of the State of New

> Jersey and of the Township of Rutherford, but any relation of that Township to the litigation is not disclosed to one not familiar with local geography. Klein is set out as a citizen and taxpayer of the Borough of Hawthorne in the State of New Jersey, and it is alleged that Hawthorne has a high school supported by public funds. In this school the Bible is read, according to statute. There is no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school. No information is given as to what kind of taxes are paid by appellants and there is no averment that the Bible reading increases any tax they do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it."

Petitioner's complaint is subject to the same deficiencies as the complaint in the *Doremus* case. The only allegations pertaining to petitioner's status as a taxpayer are found in Paragraph "Second" of the complaint, where he states that he is the owner of property known as No. 9 Columbus Avenue, and that he is assessed and is liable for taxes thereon (R. 13); and Paragraph "Twenty-Fifth" (R. 25), which alleges: "That serious and irreparable damage and injury will be caused to the plaintiff and to other taxpayers by the carrying out of the provisions of said redevelopment project plan and the contracts hereinabove referred to; that the same are illegal, unconstitutional, null and void as hereinabove alleged."

We respectfully submit that under the authority of the *Doremus* case, Paragraph "Twenty-Fifth" of the complaint is insufficient to invoke this Court's jurisdiction to pass upon the claim that petitioner is being deprived of his property without due process of law.

CONCLUSION

The taking of petitioner's property is a taking for public use and is, therefore, constitutionally permissible. The instant case is no exception to the long line of cases of which this Court said in *Hairston* v. *Danville & Western Railway*, 208 U. S. 598, 607 (1908):

> "No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws."

And see the concurring opinion of Mr. Justice FRANKFURTER in *United States ex rel. T. V. A. v. Welch*, 327 U. S. 546, 557 (1946), bringing the unbroken line of such cases down to 1946. Research has revealed no cases decided since then to interrupt the uniformity of this Court's interpretation of the due process clause as a limitation on the States' power of eminent domain.

The petition for a writ of certiorari should be denied.

February 8, 1954.

Respectfully submitted,

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APPENDIX

Section 72-k of the General Municipal Law of the State of New York reads as follows:

§72-k. Acquisition of real property for clearance and rehabilitation; sale or lease of property for such purposes

1. The governing board or other appropriate authority of a municipal corporation may acquire by purchase, gift, devise, lease, condemnation or otherwise, in accordance with the provisions of any appropriate general, special, or local law applicable to the acquisition of real property by such municipal corporation, real property or any interest therein necessary for or incidental to the clearance, replanning, reconstruction, and neighborhood rehabilitation of substandard and insanitary areas, together with adequate provision for recreational and other facilities appurtenant thereto.

2. In addition to employing any other lawful method of utilizing or disposing of any real property or any interest therein owned by a municipal corporation, or acquired by it pursuant to subdivision one of this section, such municipal corporation, acting through its board of estimate or other governing body, may sell, lease for a term not exceeding ninety-nine years, or otherwise dispose of any such real property to any person, firm or corporation at the highest marketable price or rental at public auction or by sealed bids pursuant to the provisions of any general, special or local law applicable to the sale or disposition of real property by such municipal corporation, for the purpose of clearance, replanning, reconstruction and neighborhood rehabilitation by the purchaser of such real property in substandard and insanitary areas, in such manner as may be prescribed by the board of estimate or other

governing body. Any deed, lease or instrument by which real property or any interest therein is conveyed or disposed of in such manner shall contain provisions requiring the purchaser or grantee to clear, replan, reconstruct or rehabilitate such property in such manner as may be prescribed by the board of estimate or other governing body, and provisions insuring the use of such real property for purposes consistent with the clearance, replanning, reconstruction and neighborhood rehabilitation of substandard and insanitary areas. Such deed or instrument may contain such other provisions, conditions and restrictions, including specifications relating to clearance, replanning, reconstruction, and rehabilitation as may be prescribed by the board of estimate or other governing body. The prior consent of the city planning commission or other analogous body of such municipal corporation shall be required for the acquisition of property by such municipal corporation for the purposes of this subdivision, which prior consent shall be based upon a finding made by such city planning commission or other analogous body after a public hearing thereon, that such acquisition is necessary for the clearance, replanning, reconstruction and neighborhood rehabilitation of real property in a substandard and insanitary area.

3. In proceeding under this section in addition to all other powers which it may exercise, a municipal corporation, acting through its board of estimate or other governbody, may: (1) cooperate with the federal government and apply for and accept financial assistance, loans and grants, as provided in title I of the housing act of nineteen forty-nine and all federal laws amendatory and supplemental thereto; (2) provide local grants-in-aid in the form of municipal services and facilities as provided under such federal laws; (3) contract with the federal government as provided under such federal laws including agreements to

comply with (a) provisions requiring payment of not less than certain minimum salaries and wages to architects, engineers, technicians, laborers, mechanics and other personnel; (b) provisions prohibiting rebates and kick-backs; (c) provisions requiring contractors and subcontractors to furnish reports and other data to the secretary of labor; and (d) such other provisions, covenants, and conditions as the federal agency may deem necessary or desirable for effectuating the federal purposes; (4) issue bonds or other obligations for the acquisition of the property in the same manner as for the acquisition of property for other public purposes. The period of probable usefulness of such purpose is hereby determined to be fifteen years; (5) provide, in the discretion of the board of estimate or other local governing body, for clearance of the property by the municipality or by the person, firm or corporation to whom such property is sold or leased. In the event that clearance is provided by the municipality, the cost of such clearance shall be financed in the same manner as acquisition costs.